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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CV-N-01-0700 - DWH (VPC)

MICHAEL J. CONLON, Plaintiff, v. UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF JUSTICE; JOHN ASHCROFT, Attorney General; FEDERAL BUREAU OF PRISONS; NANCY BAILEY, Warden of FGI, Safford, Arizona; UNITED STATES PAROLE COMMISSION; JOHN R. SIMPSON; U.S. Parole Commissioner; UNITED STATES PROBATION OFFICE; KEVIN LOWRY, U.S. Probation Officer; PATRICK FOY, U.S. Probation Officer; THOMAS COLLINS, U.S. Probation Officer; JOHN LAWHEAD, U.S. Probation Officer; UNITED STATES SENTENCING COMMISSION; Defendants.	REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS COMPLAINT OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Come now each of the named defendants in this action, individually and collectively and through their undersigned counsel, and submit this reply memorandum in further support of

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their dispositive motion. This reply memorandum is filed pursuant to Local Rule 7-2(c).[1]

In response to the defendants' motion, plaintiff argues that he should be able to establish the viability of this action through discovery, that Rule 12(b), F.R.Civ.P., requires the Court to accept as true the well-pleaded allegations of the complaint, that summary judgment is inappropriate because his claim is based on the "state of mind" of the defendants, that service by mail was effective service of process on the individual defendants, and that none of the defendants is entitled to dismissal based on absolute or qualified immunity. Additionally, plaintiff asserts that he intends to file another (second) amended complaint in order to "clarify" his claim under the Federal Tort Claims Act, which he claims he may do as a matter of right under Rule 15, F.R.Civ.P.

As discussed below, plaintiff's arguments are uniformly unconvincing and should be rejected. This action should be dismissed on multiple alternative grounds.

1. Rule 12(b)(1) Does Not Require the Court to Accept as True the Allegations of the Complaint

A substantial component of the defendants' motion is directed to the Court's jurisdiction and thus is properly styled

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[1] Plaintiff repeatedly refers to the "government's motion" in his response. The subject motion is not the "government's motion" but rather a motion brought by the individual defendants plaintiff elected to sue for money damages, as well as the institutional defendants named in the complaint.

a motion to dismiss under Fed. R. Civ. P. 12(b)(1).[2] An issue of subject matter jurisdiction is properly decided under Rule 12(b)(1). See McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989). A Rule 12(b)(1) motion may be used to attack two different types of jurisdictional defects. The first is the plaintiff's failure to plead facts sufficient to show that the federal court has jurisdiction over the subject matter of the case, a so-called "facial" challenge to jurisdiction. The second defect that may be challenged by a Rule 12(b)(1) motion is an actual lack of jurisdiction over the subject matter, a so-called "factual" challenge. Wright & Miller, § 1350, pp. 211-212; see also White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000). A Rule 12(b)(1) motion may be intended as either a facial or a factual challenge to the court's subject matter jurisdiction. See White v. Lee, 227 F.3d at 1242. In reviewing a facial attack, the court may consider the allegations of the complaint, and documents referenced or attached, in a light most favorable to the plaintiff. See FDIC v. Nichols, 885 F.2d 633, 636 (9th Cir. 1989).

In reviewing a factual challenge, however, the court may consider evidence outside the pleadings. See White v. Lee, 227 F.3d at 1242. In a factual attack, no presumptive truthfulness attaches to the plaintiff's allegations. See id.; Augustine v.

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[2] Some of the defendants also moved for dismissal under Rule 12(b)(6), because there are no allegations made against them in the complaint. See Defendants' Motion, pp. 26-27.

United States, 704 F.2nd 1074, 1075, 1077 (9th Cir. 1983); Mortensen v. First Federal Savings and Loan Association, 549 F.2d 884, 891 (3d Cir. 1977); accord, St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989); Crowley Marine v. Fednav Ltd., 924 F.Supp. 1030, 1033 (E. D. Wash. 1995); see also Thornhill Pub. v. General Telephone Electronics, 594 F.2d 730, 733 (9th Cir. 1979); Timberlane Lumber v. Bank of America, 574 F.Supp. 1453, 1460-1461 (N.D. Cal. 1983). Unlike a Rule 12(b)(6) motion, a moving party challenging the factual substance of the jurisdictional allegations under Rule 12(b)(1) may use affidavits and other matter outside of the pleadings. Wright & Miller, § 1350, p. 213. In ruling on a factual challenge in a motion to dismiss under Rule 12(b)(1), the trial court "is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." McCarthy v. United States, 850 F.2d at 560.

In the present case, the defendants provided declarations and other materials in support of their contention that subject matter jurisdiction is lacking. Those materials demonstrate (among other things) that jurisdiction is lacking because the individual defendants are immunized from liability claims such as those being asserted by plaintiff.

Although the defendants assert that the appropriate legal standard is that of a Rule 12(b)(1) motion to dismiss and that the Court should make findings of fact, defendants nonetheless

moved in the alternative for summary judgment under Rule 56. Pursuant to Rule 56, summary judgment should be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. One of the important goals of summary judgment is to avoid wasting resources and time where a trial would be a mere formality. Zweig v. Hearst Corp., 521 F.2d 1129, 1135-36 (9th Cir. 1975). Whether the analysis is conducted under Rule 12(b)(1) or under Rule 56, the result is the same; namely, plaintiff's claims must be summarily rejected.

2. The Defendants Are Entitled to Dismissal Prior to Discovery

Plaintiff argues that summary judgment is premature because no discovery has been conducted. Plaintiff further argues that discovery is needed because plaintiff's claim is based on the "state of mind" of the individual defendants (most of whom have never met plaintiff). Plaintiff's arguments are incompatible with the Supreme Court's repeated admonitions that public officials be spared the burden of unnecessary discovery through rigorous application of the Federal Rules of Civil Procedure, particularly Rule 56.

In Crawford-El v. Britton, 118 S.Ct. 1584 (1998), the Supreme Court characterized summary judgment motions as "the ultimate screen to weed out truly insubstantial lawsuits prior to trial." 118 S.Ct. at 1598. Moreover, as the Supreme Court has repeatedly noted, one of the purposes of the qualified immunity defense is to spare public officials the burden of unnecessary

discovery. Harlow v. Fitzgerald, 457 U.S. 800, 817 (1982); Behrens v. Pelletier, 516 U.S. 299, 308 (1996).[3] Accordingly, where the complaint alleges facts which, if proven, would amount to a violation of clearly established law but the actions the defendant actually took are different from those alleged, a motion for summary judgment before discovery is appropriate. Similarly, if the complaint leaves out significant facts which, once supplied, entitle the defendant to immunity, then summary judgment prior to discovery is appropriate. Anderson v. Creighton, 483 U.S. 635, 646 n.6 (1987)

Plaintiff's suggestion that his claim is based on the "state of mind" of (unspecified) defendants does not change the analysis. In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Supreme Court reformulated the common law qualified immunity defense to ensure that it did not turn on a subjective enquiry into the official's motives and good faith. See also Davis v. Scherer, 468 U.S. 183, 191 (1984)(Harlow adopted "a wholly objective standard"). The Harlow formulation, therefore, grants immunity to an official where the law is unclear, whether or not the defendant has a proper motive.

It is the defendants' view that the enquiry in the present case need proceed no further. The law was not clear (and is still not clear) whether a parole violation near the end of the

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[3] Stated another way, the qualified immunity of public officials is immunity from suit (and its attendant burdens), not merely immunity from damages. Hunter v. Bryant, 502 U.S. 224, 227 (1991); Siegert v. Gilley, 500 U.S. 226, 232 (1991); Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

parole term automatically tolls the parole period or whether the parole can expire during the time a parolee is in violation status. That contested legal issue eventually concluded with the District Court's (in Arizona) determination that plaintiff had been imprisoned too long. Such a determination, however, does not automatically translate into a damages claim against those individuals who reported plaintiff's parole violation, issued the arrest warrant based on the parole violation, or supervised those persons who performed those tasks. The "state of mind" of the individual defendants is, therefore, wholly irrelevant.

In order to advance a claim based on "improper motive" or "state of mind," the gravamen of the complaint must be a facially lawful or proper action which is carried out because of an invidious purpose; e.g., denial of discretionary benefits due to class-based discrimination. Plaintiff's claim does not fit this model because plaintiff alleges that the defendants' actual conduct (the issuance of the warrant, etc.) was unlawful. Moreover, even if plaintiff's complaint did fit the model of an "improper motive" claim, it would necessarily fail because the complaint does not allege sufficient facts to support such a claim.

In Crawford-El v. Britton, 118 S.Ct. at 1596-97, the Supreme Court approved the requirement that a complaint contain specific, nonconclusory allegations of fact which, if proven, would affirmatively establish the existence of the claimed unlawful motive. The complaint in the present case is woefully deficient

in this regard because it does not even specify what actions were taken by which defendant(s), much less specify what improper motives (race based, class based, gender based, etc.) prompted which defendant(s) to act in a certain manner. Even in well-pled "improper motive" cases, the Supreme Court in Crawford-El commanded that the trial court exercise its discretion to protect the substance of the qualified immunity defense, so that "officials are not subjected to unnecessary and burdensome discovery or trial proceedings." Crawford-El, 118 S.Ct. at 1596. More to the point, the Court (again) directed the district courts to "resolve the threshold question [of immunity] before permitting discovery." Id. at 1597.

Accordingly, plaintiff's suggestion that defendants' motion for summary judgment is "premature" must be rejected.[4]

3. Service of Process Has Not Been Effected

Each of the seven individual defendants argued that they have not been properly served with the summons and complaint. In response, plaintiff states that he served four of the individual defendants (Lowry, Foy, Collins, and Lawhead) by sending the summons and complaint to the U.S. Probation Office in Arizona (where none of them worked). Plaintiff has no response as to the remaining three individual defendants.

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[4] Plaintiff also states that he "intends" to bring a motion under Rule 56(f). No such motion has been filed and so no response will be made at this time regarding such a motion.

Plaintiff appears to concede that service was not proper as to defendants Simpson, Bailey, and Ashcroft. The attempted service on the four Nevada-based probation officers is obviously not adequate for this court to obtain personal jurisdiction over them.

4. The Defendants Are Entitled to Immunity

Although it is argued that the Court need not reach the issue of qualified immunity as to most of the individual defendants (because dismissal is appropriate on other grounds such as absolute immunity, lack of specificity, etc.), it is plain that all of the individual defendants are entitled to judgment in their favor based on qualified immunity. In the Ninth Circuit (as elsewhere), public officials are entitled to qualified immunity unless their conduct was such that no reasonable official situated as were the defendants could have believed that the conduct was lawful in light of clearly established law and the totality of circumstances. Alexander v. County of Los Angeles, 64 F.3d 1315, 1319 (9th Cir. 1995). "The question on qualified immunity is not whether [the defendants'] judgment was mistaken, only whether a reasonable officer could have made the judgment ... as these officers did in these circumstances." Thompson v. Mahre, 110 F.3d 716, 723 (9th Cir.), *cert. denied*, 118 S.Ct. 414 (1997).

The reporting of plaintiff's parole violation, the processing of his arrest warrant, and his consequent

incarceration do not give rise to a claim for damages against the individuals named in the complaint because a reasonable officer in the position of the defendants could have believed that such actions were lawful and appropriate.[5]

5. Plaintiff May Not File a Second Amended Complaint Without Leave of Court and an FTCA Action Would Be Untimely

Plaintiff states in his opposition that he "is filing a second amended complaint to clarify his Federal Tort Act claim." See Opposition, p.3 n.1. Plaintiff further states that he need not obtain leave of court for such a filing under Rule 15 because the defendants' motion is not a "pleading" as that term is used in Rule 15.

Plaintiff is correct that the defendants' motion is not a "pleading" as that term is used in Rule 15. However, by the plain terms of Rule 15, plaintiff may file an amended pleading as a matter of right only once. See Rule 15(a), F.R.Civ.P. Plaintiff has already filed a "first amended complaint" and must obtain leave of court before filing another amended complaint.

The amended complaint which plaintiff proposes to file is one to "clarify" an action against the United States under the Federal Tort Claims Act (FTCA). Such an action would certainly need to be "clarified" since the first amended complaint does not even attempt to allege such a cause of action. Such an action

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[5] In order to properly evaluate the defendants' qualified immunity defense, it is essential that each defendants' conduct be individually analyzed within the qualified immunity calculus.

would not be viable and would be subject to immediate dismissal (and is subject to dismissal to the extent the current complaint is imaginatively construed as alleging an FTCA claim) because plaintiff did not file a timely administrative tort claim, a jurisdictional prerequisite under the FTCA.

Plaintiff claims that he was falsely arrested, based on an improper calculation of his parole status, in February 1998 and was thereafter imprisoned unlawfully. See First Amended Complaint, paras. 20-23. Plaintiff has attached to his opposition memorandum (as exhibit B) two letters acknowledging receipt of administrative tort claims submitted by plaintiff in July 2001. Any FTCA action based on those administrative tort claims would be barred because the claims are untimely.

There is a two-year limitations period for submission of the required administrative claim under the FTCA. 28 USC, section 2401(b); Davis v. United States, 642 F.2d 328, 330 (9th Cir. 1981), *cert. denied*, 455 U.S. 919 (1982). The date on which a claim accrues is determined by federal law. Washington v. United States, 769 F.2d 1436, 1438 (9th Cir. 1985). Here, the alleged tort (false arrest) occurred in February 1998 and his damages began to accumulate on that date. All of his alleged damages arise from the single event (arrest) which occurred in February 1998. Accordingly, the administrative claims filed in July 2001 were untimely and can not provide the jurisdictional basis for an FTCA cause of action.

Plaintiff may attempt to salvage his proposed FTCA claim by arguing that he was subjected to a continuing tort which effectively tolled the statute of limitations until he was released from prison. Such an argument would fail. For a continuing violation to be established, there must be a series of tortious acts one or more of which falls within the limitations period. Western Center for Journalism v. Cederquist, 235 F.3d 1153, 1157 (9th Cir. 2000). A continuing violation is occasioned by continual unlawful acts rather than by the continual ill effects from an original violation. Ward v. Caulk, 650 F.2d 1144 (9th Cir. 1981). Assuming that a tort was committed in February 1998 (or earlier) when plaintiff was arrested, the tort was completed at that time and plaintiff was required to submit an administrative claim within two years thereafter in order to support a viable FTCA claim.

In Sandutch v. Muroski, 684 F.2d 252 (3rd Cir. 1982), the Third Circuit rejected the notion that a continuing incarceration was a continuing tort. In the absence of allegations of unlawful acts while incarcerated, the continuing incarceration was simply the continuing ill effects from the initial tortious conduct which resulted in the incarceration. Id. at 254. The same result was reached in Maslauskas v. United States, 583 F.Supp. 349 (D.Mass. 1984)(FTCA suit untimely based on negligence of Parole Commission-incarceration was not continuing violation).

6. Conclusion

Based on the foregoing discussion and the arguments and materials which accompanied the defendants' motion, this action should be dismissed or, in the alternative, summary judgment entered against plaintiff and in favor of each defendant.

Respectfully submitted,

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GREG ADDINGTON
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT was mailed by first-class mail, postage pre-paid, on September 10, 2002:

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